(20)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 153

J. E. FARRELL, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 5, 1943.

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (known as the Tax Court of The United States) (R. 26-45) is reported in 45 B. T. A. 162. The opinion of the Circuit Court of Appeals (R. 289-29) is reported in 134 F. (2d) 193.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 5, 1943 (R. 292). A timely petition for rehearing was denied on April 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The question presented in this case is whether the proceeds of certain oil runs accumulated in the years 1933, 1934, and 1935 were taxable to the petitioner in those respective years or in the year 1936.

STATUTE AND REGULATIONS INVOLVED.

The pertinent statutory provisions herein involved are contained in the Appendix.

SUMMARY STATEMENT OF THE MATTER HEREIN INVOLVED.

Petitioner, on March 11, 1931, with his then wife, Stella B. Farrell, owned as community property, one-half of a seven-eighths working interest in some 42 oil and gas leases in East Texas (R. 77). The other one-half was owned by four other individuals. (R. 77.)

On March 11, 1931, petitioner and the four individuals assigned to Yount-Lee Oil Company, a Texas Corporation, all of their interest in these leases. (R. 77, 130-137.) They received $1,270,000 cash and reserved one-fourth of the oil produced under the working interest until they should have received a total of $2,000,000 out of the production, free of all cost and expense to them. (R. 77-78, 137-9.) Payments were to be made on or before the 20th day of each month following the month in which the oil was produced and saved. (R. 139.)

On July 8, 1931, Stella B. Farrell filed suit in Texas for divorce from petitioner, praying for an inventory and appraisement and partition of the community property. (R. 78, 142-3.) On the same date, petitioner and Stella entered into a written agreement providing that in lieu of a partition of the community estate, petitioner should pay Stella $750 per month for life, and she agreed to transfer and convey to petitioner her share of the community estate. (R. 78, 145-8.) On August 8, 1931, Stella was granted an ab-

solute divorce and the decree provided that her share of the community estate be recovered by Farrell and that it should become his sole and separate property. (R. 78, 144-5.) Four days later Stella married Albert L. Burguieres. (R. 78.)

This settlement and decree was confirmed by sealed instruments of release and conveyance executed by Mrs. Burguieres, individually and with her new husband. (R. 79, 148-150.)

On July 5, 1933, Mrs. Burguieres filed a suit in the Texas State Courts and made petitioner and Yount-Lee Oil Company defendants. (R. 79.) That suit was in the nature of a bill of review to set aside the property portion of the divorce decree and also to set aside all agreements and releases previously executed by Mrs. Burguieres. As grounds the bill alleged fraudulent misrepresentations and concealment. (R. 150-173; 85 S. W. (2d) 960.)

The prayer in Mrs. Burguieres' original bill was that she be declared to be the owner of an undivided one-half interest in the agreement of March 11, 1931; and of the proceeds already accrued and to accrue thereunder. (R. 151, 85 S. W. (2d) 960.) A temporary restraining order was obtained against petitioner and continued until hearing on the merits. (R. 151, 202, 203.)

In her final pleading, a second amended petition filed on May 5, 1934, Mrs. Burguieres demanded a one-half interest in the oil payments due from Yount-Lee and, with respect to the other half, she asked for a lien to secure any *personal judgment* that she might recover against Farrell for waste or depreciation in value of the community estate. (R. 173.)

After trial, on June 8, 1934, the Texas District Court directed a verdict for the defendants, (R. 80, 213) and the Court entered judgment for the defendants and ordered that all restraining orders and/or temporary injunctions that had not expired by the terms thereof should be set aside and annulled. (R. 80, 215.)

On September 21, 1934, Mrs. Burguieres appealed to the Court of Civil Appeals of Texas. (R. 81; 216-217.) On

June 28, 1935, the Court of Civil Appeals unanimously affirmed the judgment of the District Court. (R. 81; 85 S. W. (2d) 952-978) and on September 6, 1935, overruled a motion for rehearing and to certify questions to the Supreme Court of Texas. (R. 81; 85 S. W. (2d) 978-980.) On October 5, 1935, Mrs. Burguieres filed in the Supreme Court of Texas a petition for writ of error to the Court of Civil Appeals. (R. 82.) On November 6, 1935, the Supreme Court in a written opinion concluded that it was without jurisdiction to allow the writ[1] and accordingly dismissed the petition. (R. 82.)

On November 21, 1935, Mrs. Burguieres filed in the Supreme Court of Texas a motion for leave to file petition for Mandamus to require the Court of Civil Appeals to certify questions in *Burguieres* v. *Farrell.* That motion was denied, *per curiam,* and without opinion, on January 8, 1936. (R. 82.) On January 23, 1936, Mrs. Burguieres followed this with a motion for rehearing which was overruled on March 11, 1936. (R. 82.)

After March 11, 1931, Yount-Lee worked the oil and gas leases, and rendered to petitioner regular monthly statements of crude oil runs and casinghead gas sold from these leases. (R. 82-83, 229-239, 93, 96.) It was the practice of Yount-Lee Oil Company to mail with the statement a check payable to petitioner covering his interest. (R. 231-239, 96.)

The last check mailed to petitioner before the Burguieres litigation was on or about June 20, 1933. (R. 249, 96.) Thereafter Yount-Lee Oil Company suspended monthly payments but continued to render regularly each month detailed statements of the oil and gas runs for the preced-

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[1] Art. 1821, R. C. S. of Texas, 1925, as amended provided:

"Judgment conclusive on law.—The judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to-wit:

* * * * *

"3. All cases of divorce."

ing month and of Farrell's interest in the proceeds. (R. 83, 249-250, 93, 96.)

On its books and records, Yount-Lee posted these amounts to the credit of petitioner. (R. 241-242.) The amount thus accumulated for the account of petitioner up to August 1, 1935, was $348,529.19. (R. 83.)

On July 31, 1935, Yount-Lee transferred to Stanolind Oil and Gas Company its interest in the oil and gas leases aforesaid, subject to the agreement of March 11, 1931. (R. 83.) At the same time, Yount-Lee deposited in escrow in the First National Bank of Houston the sum of $1,267,951, to be paid out on the joint order of Wright Morrow[1] and of Stanolind Oil and Gas Company to various persons, among whom was petitioner. The amount provided for petitioner was $348,904.75. (R. 83, 218-219.)

Beginning with August 1, 1935, the oil and gas leases in question were worked by Stanolind Oil and Gas Company which sold the oil and gas produced. (R. 84, 96.) Petitioner was furnished monthly statements similar to those previously furnished by Yount-Lee. (R. 93-96, 243-247.)

From August 1, 1935, to and including December 31, 1935, no payments were made to petitioner with respect to the oil and gas produced and sold, but the amount accumulated over that period was $54,143.64. (R. 64.)

Subsequent to July, 1934, Yount-Lee held the proceeds for petitioner's account and benefit and as security for any *personal obligation* of petitioner that might be established against him by Mrs. Burguieres in the pending litigation. (R. 96, 111-112, 116, 117, 121.) Upon demand by petitioner for said moneys, the Yount-Lee Oil Company declined payment. (R. 96, 97, 109, 116, 117, 121, 122.)

Subsequent to April 11, 1936, because they considered the Burguieres litigation terminated, the Yount-Lee Oil Company, Stanolind Oil and Gas Company, and Wright Morrow directed payment of $348,529.19 with respect to oil and gas

[1] Wright Morrow of Houston, Texas, had purchased all of the stock of Yount-Lee. (R. 112.)

sold or run by Yount-Lee Oil Company up to August 1, 1935. (R. 84, 121; of R. 35.)

On April 11, 1936, there was also paid to petitioner the sum of $54,143.63 by Stanolind for oil and gas sold by it from August 1, 1935, to and including December 31, 1935. (R. 84.)

Of the aforesaid sums, the amounts attributable to oil and gas produced and sold in the respective years 1933, 1934 and 1935, were as follows (R. 85):

1933	$80,661.64
1934	172,505.04
1935	149,506.15
Total	$402,672.83

The Commissioner treated the entire accumulations aggregating $402,672.83 as income taxable to petitioner for the year 1936 and on that basis determined a deficiency of $198,044.98. (R. 85, 21.) The Commissioner's determination was sustained by the Board of Tax Appeals. (R. 26-47.) On petition for review, the Circuit Court affirmed the Board's decision. (R. 289-292.) (J. Hutcheson concurred in the result only.)

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred as a matter of federal tax law in holding that whether the legal relationship of a group or joint venture existed within the meaning of the Revenue Acts was an "inference of fact" on which the Board's finding was conclusive if supported by substantial evidence.

2. The Circuit Court of Appeals erred in failing and refusing to hold that under the agreement of March 11, 1931, petitioner was a participant in a group or joint venture for the exploitation of the leases in question within the meaning of the Revenue Acts of 1934 and 1936.

3. The Circuit Court of Appeals erred in failing and refusing to hold that as a matter of law, petitioner owned at

least one-half of the oil and gas proceeds allocable to him under the agreement of March 11, 1931, which was never questioned at any time by Stella B. Burguieres in her suit against the petitioner, which constituted income to the petitioner in the year earned.

4. The Circuit Court of Appeals erred in failing and refusing to hold that to the extent and use of one-half of the proceeds allocable to petitioner under the agreement of March 11, 1931, as security for any personal obligations of petitioner, said use constituted the use and enjoyment of said proceeds for and by petitioner and rendered said proceeds taxable income in the year earned.

REASONS FOR ALLOWANCE OF WRIT.

I.

The question of whether a group or joint venture exists within the statutory definition of partnership is one of law and not of fact as held by the Circuit Court of Appeals. The Circuit Court opinion represents a serious departure from established law and operates to deprive petitioner of the judicial review to which he is entitled.

The holding of the Circuit Court of Appeals raises a serious question of statutory application of the term "group or joint venture" within the intent and meaning of the revenue laws. (Appendix.)

The Court held that "whether any such legal relationship existed between petitioner and Yount-Lee was an inference of fact * * *" and held itself bound by the Board's conclusion as supported by ample evidence. It made no independent analysis of this obvious legal conclusion.

The revenue acts since 1932, differently from previous acts, define the term "partnership" as including a group or joint venture, the taxation of which had formerly offered troublesome problems. The application of this statutory definition became and remains entirely a question of law and not of fact. *Lewis and Company* v. *Commissioner*, 301

U. S. 385. The interpretation and construction of the basic agreement of March 11, 1931, was also a question of law and not one of fact. 33 Corpus Juris, 845; *First Mechanics Bank* v. *Commissioner*, 91 F. (2d) 275, (C. C. A. 3). It is self-contradictory in terms to speak as the lower Court did, of a "legal relationship" as an inference of fact. In reality it is the application of a statutory provision properly interpreted to a given factual situation. There is no dispute here as to the facts—there is, however, a dispute as to the proper application of the statutory definitions to those facts. It is the primary function of a Circuit Court of Appeals to review the Board's decision in that regard and independently determine that legal relationship. This the lower Court has failed and refused to do and in so doing, has deprived petitioner of the only judicial determination of law questions which the statutes provide in Board of Tax Appeals (now Tax Court) cases. This presents a serious question in the administration and application of federal tax laws calling for the interposition of this Court to fix the scope of review in such cases.

II.

The Board of Tax Appeals found that Stella B. Burguieres sued to recover only one-half interest in the proceeds. The Circuit Court of Appeals in failing to hold that ownership of the other one-half remained in petitioner and was constructively received by him, decided the case contrary to principles of taxation announced in previous opinions of this Court.

The Board found that Stella Burguieres in the Texas suit sued for only one-half of her community interest in the proceeds from the sale of the oil in question. Title to the other half belonged at all times to petitioner even though Mrs. Burguieres sought to charge it with an equitable lien to secure reimbursement for possible personal obligations of petitioner.

Since title to this one-half was not litigated it belonged to petitioner and the proceeds were constructively received by him for tax purposes upon accumulation prior to 1936. Under application of the doctrine in *Thomas* v. *Perkins*, 301 U. S. 655 and *Dearing* v. *Commissioner*, 102 F. (2d) 91 (C. C. A. 5th Cir.) this one-half may also be regarded as having been actually received by Farrell. The Circuit Court of Appeals in its opinion and decision entirely overlooked the one-half undisputed oil proceeds.

In its opinion the Circuit Court (R. 291) states that the ownership of oil and the extent to which it belonged to petitioner was conjectural until settled by final decree in 1936. The statement is plainly erroneous because—

1. Ownership of one-half of the oil payments was never claimed by Mrs. Burguieres at any time;

2. The ownership of the whole had been judicially adjudicated in the original divorce action. Mrs. Burguieres' later suit was simply a bill of review—such a bill may not in substance or in law be considered a litigation over ownership of the oil payment.

In a real sense this one-half represented economic gain to petitioner prior to 1936. As stated in *Helvering* v. *Horst*, 311 U. S. 112, 85 L. ed. 75 (p. 77):

> "* * * But the decisions and regulations have consistently recognized that receipt in cash or property is not the only characteristic of realization of income to a taxpayer on the cash receipts basis. Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; *Corliss* v. *Bowers*, 281 U. S. 376, Cf. *Burnet* v. *Wells*, 289 U. S. 670.

And as further stated by this Court in *Raybestos-Manhattan, Inc.* v. *U. S.*, 296 U. S. 60, 64, that

> "* * * Income is not any the less taxable income of the taxpayer because by his command it is paid directly to another in performance of the taxpayer's obligation to that other. * * *"

The Court below therefore, in refusing to hold that Petitioner received one-half of the oil payments in question prior to 1936 raised an important question of federal taxation in respect of the scope of the constructive receipt principle, which should be decided by this Court.

CONCLUSION.

It is, therefore, respectfully submitted that this case calls for the exercise by this Court of its reviewing functions in order that the errors herein pointed out may be corrected, and the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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APPENDIX.

Revenue Acts of 1934 and 1936.

Sec. 22. GROSS INCOME.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Sec. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

Sec. 182. TAX OF PARTNERS.

There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.

Sec. 801.[1] DEFINITIONS.

(a) When used in this Act—

* * * * * * * * * *

(3) The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * * * * * * *

[1] Revenue Act of 1934. Corresponding provision in Revenue Act of 1936 is contained in Section 1001 thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 153

J. E. FARRELL, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 36–45) is reported in 45 B. T. A. 162. The opinion of the Circuit Court of Appeals (R. 289–291) is reported at 134 F. 2d 193.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 5, 1943 (R. 292). Rehearing was denied April 10, 1943 (R. 296). The petition

for a writ of certiorari was filed July 9, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether payments reserved under an assignment of oil and gas leases were income to the taxpayer-assignor reporting on the cash basis, when received by him in 1936 or in earlier years when the oil was run but the assignees refused to make the payments because of pending litigation in which the taxpayer's former wife asserted an interest in the funds.[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*.

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[1] In separate proceedings for redetermination of deficiencies assessed for the years 1933 and 1936 which were consolidated in the Board of Tax Appeals for hearing and report (R. 10, 12, 26), it was stipulated that if the oil payments represented income for 1936, as the Commissioner asserted, there would be a deficiency in tax for that year and an overpayment of tax for 1933 (R. 86). The Board of Tax Appeals, confirming the Commissioner, entered its orders accordingly (R. 45–47). The Commissioner petitioned for review from the order (R. 46) determining an overpayment of tax for the year 1933, as a matter of protection in the event the Circuit Court determined that the oil payments were not properly taxable in 1936 (R. 69–72). The cases were consolidated for briefing, hearing, argument, and decision in the court below (R. 125–126), and a single judgment of affirmance entered (R. 292).

STATEMENT

The facts material to the issues raised by the petitioner may be summarized from the findings of the Board of Tax Appeals as follows (R. 27–36):

On March 11, 1931, petitioner and his then wife, Stella B. Farrell, owned as community property an undivided one-half of the seven-eighths working interest in certain Texas oil and gas leases and equipment. The remaining interest was owned by four individuals. (R. 27.) On that date, the coowners transferred all interest in the leases to the Yount-Lee Oil Company, a Texas corporation, for cash, deferred payments payable in 1931, and $2,000,000, which the instrument of assignment provided was (R. 27)—

> to be paid out of one-fourth (¼) of said Yount-Lee Oil Company's working interest in the oil and/or gas produced and saved from the lands covered by this assignment, if, as and when produced and saved and only in such event, free of all cost and expense to Grantors; it being expressly understood in this connection that said Yount-Lee Oil Company shall be under no obligations to Grantors to drill upon or develop said lands, or any part thereof

except to drill offset wells under certain specified conditions. If Yount-Lee sold the oil it was to account to petitioner as produced "on the basis of the sale price at the well received by said Yount-Lee Oil Company," but in no event at less than the

posted price or 30 cents per barrel. Young-Lee was given an option to purchase the oil at the posted price (any oil run to be considered a purchase), subject to a minimum price of 30 cents per barrel. Payments were to be made to the grantors in the month next following the month in which the oil was produced and saved. Petitioner's share of the oil payment as community property was 50%. (R. 27–28.)

In July 1931, petitioner's wife filed suit for divorce and for partition of their community property. In granting the decree, the Texas court ordered that petitioner recover from the plaintiff as his own separate property all the property of the community estate, the parties having entered into a property settlement agreement whereby the plaintiff wife accepted the sum of $750 per month for life in lieu of a partition of the community estate. Shortly after the divorce, the former Mrs. Farrell married one Burguieres, and in November 1931, she and Burguieres jointly conveyed to petitioner in confirmation of the property settlement and decree, all interest including her community interest, in amounts paid and to be paid by Yount-Lee under the assignment of March 11, 1931. (R. 28.)

In 1933, Stella B. Burguieres filed suit against petitioner and Yount-Lee in the Texas District Court, alleging that the property settlement agreement incident to her divorce from petitioner

was void as fraudulently procured. The prayer of the petition included a request for a temporary order restraining petitioner from receiving any further payments under the oil lease assignments. (R. 28.) On July 5, 1933, the court issued the restraining order as prayed, and on August 16, 1933, such temporary restraining order was by stipulation continued in force until trial of the case on the merits (R. 29).

In an amended petition filed May 5, 1934, Mrs. Burguieres alleged that the proceeding was brought to recover of both defendants an undivided one-half interest in the $1,000,000 oil payment, the other one-half being charged with an equitable lien in her favor to secure reimbursement for the part withheld from her by petitioner, and for one-half of the community estate accumulated during their marriage. She asked that the property settlement agreement be declared null and void, that the decree of the court respecting the community estate be vacated, that a judgment be entered for an equitable partition of the community estate as of August 8, 1931 (the date of the divorce decree), that all property then in possession of petitioner be declared to be community property, that she recover of both defendants one-half of the $1,000,000 oil payment, and that any personal judgment against petitioner be protected by an equitable lien upon the oil payment. Petitioner answered, denying the allegations. (R. 29.)

When the proceeding came on for hearing, the court directed a verdict for the defendants, and on June 8, 1934, entered judgment and vacated all restraining orders issued in the case accordingly (R. 31). The plaintiff, without filing a supersedeas or applying for any interim injunction, appealed to the Court of Civil Appeals, which affirmed the judgment of the court below on June 28, 1935. Further proceedings in the case continued, however, until March 11, 1936. (R. 31–32.)

During all of 1933, 1934, and 1935 Yount-Lee or Stanolind Oil and Gas Company, which in July of 1935 succeeded to Yount-Lee's rights in the leases, sold or ran gas and oil produced from the leases under the assignment agreement of March 11, 1931; payments were made regularly to petitioner each month until the commencement of suit by his former wife. Commencing with oil runs made in June 1933, and gas runs made in April 1933, payments to petitioner were discontinued. (R. 32.) Yount-Lee thereafter deposited in escrow the payments due petitioner for the balance of 1933, for 1934 and for part of 1935; the rest of the 1935 payments were retained by its assignee, Stanolind Oil and Gas Company. The amount so accumulated aggregated $402,672.82. (R. 32.)

Petitioner made no demands upon Young-Lee while the injunction was in effect. In December of 1934, he made a formal demand for payment,

to which Yount-Lee's counsel responded that in the opinion of the company it was necessary to hold the money "in suspense" until the Burguieres suit was finally disposed of or an agreement reached between the plaintiff and defendant therein with reference to these funds, even though petitioner had obtained judgment in the lower court and no supersedeas bond had been filed. In August and again in November, 1935, petitioner was informed that the assignees deemed it unsafe to pay him the amount due without protection against liability to Stella R. Burguieres. Negotiations looking toward payment under indemnity were never consummated. Other demands for payment during 1935 and 1936 were refused. In March 1936, petitioner brought suit against the withholders to recover the payments due under the contract, alleging repeated demands and refusals, and asking special damages in the sum he would be required to pay in additional income taxes by reason of the withholding; the suit was still pending at the time of the hearing of this matter before the Board of Tax Appeals. (R. 32–35.)

During the period in which the assignees withheld payment, they rendered petitioner monthly statements showing the amounts due him under the assignments as the oil and gas was run. The amounts payable to him were credited on the books of Yount-Lee in an account headed "J. E. Farrell". (R. 35.)

In April of 1936, the withheld funds were paid over to petitioner because of the termination of the Burguieres litigation (R. 35).

The income-tax returns of petitioner for the years 1933 to 1936, both inclusive, were made on the cash basis. He did not treat any part of these payments on his books or in his original income-tax returns as taxable income to him for the years 1933, 1934, and 1935. In September 1936, petitioner filed amended returns for 1933, 1934, and 1935, and included therein as taxable income the amounts payable to him under the assignments for oil and gas sold or run during each period. (R. 35–36.)

In his determination of a deficiency for 1936, the Commissioner included the entire amount in petitioner's taxable income for that year (R. 35). The Board of Tax Appeals confirmed the Commissioner's ruling (R. 47), and its decision was affirmed by the court below (R. 292) on the ground that the funds did not become available to petitioner reporting on the cash basis, or subject to his control and disposition until 1936, that at all times prior thereto the possibility existed that he might never receive them, and that Yount-Lee was not petitioner's agent, partner, or joint venturer so as to make the income taxable to him in the prior years as income distributable though undistributed (R. 290–291).

ARGUMENT

Further review of this case is unwarranted; it was correctly decided in the court below and no conflict is presented.

Petitioner made his returns on the cash basis (R. 36). None of the amount here involved was paid to him until 1936; and under the allegations (R. 152–171) and broad scope of the prayer (R. 172–173) of the petition in the suit instituted by taxpayer's former wife, manifestly until the litigation ended in that year it was uncertain that petitioner would ever receive any part of these funds.

Since petitioner reported on the cash basis, it would not be material were it true as asserted (Pet. 8–9), that the litigation challenged his right only to one-half of the oil payments and that no uncertainty existed therefore with respect to the remainder. Where a taxpayer makes his returns on the cash basis the question, of course, is only whether he received the amount during the taxable year. Pending outcome of the former wife's suit, the assignees withheld these funds in their entirety. Nor was any of the amount subject to petitioner's disposition and control so as to be "constructively" received by him prior to 1936; to his repeated demands for payment, the withholders answered that they would not release the funds until the litigation was concluded, or the parties thereto reached agreement concerning their disposition.

Neither were these funds taxable to petitioner prior to 1936 as his distributable share of the income of a "partnership" within the statutory definition of that term. See Section 1001 (a) (3) of the Revenue Act of 1936 (Appendix, *infra*). It is not necessary to consider whether determination of the relationship existing under the oil-lease assignments between petitioner and the assignee-withholders was a question of law as petitioner contends (Pet. 7–8), or an inference of ultimate fact as the court below held (R. 291). For we submit that no conclusion other than that this relationship was not within the ambit of Section 1001 (a) (3) could be sustained on the record. The only factor which conceivably pointed to joint venture was that under the assignment petitioner apparently retained an economic interest in the oil and gas in place to the extent of the payments reserved. Cf. *Thomas* v. *Perkins,* 301 U. S. 655. But he was clearly not an associate in a venture;[2] he was merely a pas-

[2] Under the assignment no "venture" was in fact undertaken. The assignee did not agree to drill any wells, except protective offsets, or otherwise to develop the property; such undertaking was in fact expressly negatived. Cf. *Ortiz Oil Co.* v. *Commissioner*, 102 F. 2d 508 (C. C. A. 5th); *Helvering* v. *Armstrong*, 69 F. 2d 370 (C. C. A. 9th); *Reynolds* v. *McMurray*, 60 F. 2d 843 (C. C. A. 10th).

sive recipient of a stipulated amount of the proceeds from operations carried on by the assignees.[3]

CONCLUSION

There is no conflict and the decision below is correct. The petition for certiorari should be denied.

Respectfully submitted.

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JULY 1943.

[3] The stipulated payments were to be made to petitioner entirely free of expense to him (R. 27). Cf. *Helvering* v. *Armstrong*, *supra*; *Reynolds* v. *McMurray*, *supra*. And the assignee agreed to pay petitioner a minimum per barrel price for all oil sold, with an option in itself to purchase at the average posted price subject to the minimum (R. 27). Petitioner was not to "share" in the profits; after the agreed $1,000,000 was paid him by the assignees, he had no further interest in the proceeds of production or in the source (R. 27). He had no voice in the management or conduct of the enterprise, nor was management "delegated" by him to the assignee. Cf. *Commissioner* v. *N. B. Whitcomb, Etc.*, 95 F. 2d 596 (C. C. A. 5th).

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

SEC. 182. TAX OF PARTNERS.

There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.

SEC. 1001. DEFINITIONS.

(a) When used in this Act—

* * * * *

(3) The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

Sections 22 (a), 42, and 1111 (a) (3) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Sections 22 (a), 42, and 801 (a) (3) of the Revenue Act of 1934, c. 277, 48 Stat. 680, are identical with the provisions of Sections 22 (a), 42, and 1001 (a) (3), respectively, of the Revenue Act of 1936 set out above. Section 182 of the Revenue Acts of 1932 and 1934 is substantially the same as Section 182 of the Revenue Act of 1936 set out above.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 42–2. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income

> must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

Article 332 of Treasury Regulations 77, promulgated under the Revenue Act of 1932, and Article 42–2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, are substantially the same as Article 42–2 set out above.

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